Unreportable

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) No.5582 of 2007. AND W.P.(C) No.5583 of 2007

DATE OF HEARING: 08.08.2007
DATE OF DECISION : 07.09.2007

IN THE MATTER OF :

M/s.Kailash Chemist ..... Petitioner in WP(C)No.5582/07.
M/s.Jain Medicos ..... Petitioner in WP(C)No.5583/07.

Thru. Mr.Sandeep Sethi,Sr.Advocate with
Mr.Rajesh Gupta and Mr.Harpreet Singh
Advocates.

- Versus -

Union of India & Ors. ..... Respondents.

Thru. Mr.Keshav Dayal,Sr.Advocate
with Mr.Harsh Jaidka, Advocate for
Respondents 1 and 2.

Mr.A.K.Singla,Sr.Advocate with
Mr.Pankaj Gupta, Advocate for
Respondent no.3.

CORAM :-
THE HON'BLE MR.JUSTICE A.K.SIKRI
THE HON'BLE MR.JUSTICE VIPIN SANGHI

1. Whether Reporters of Local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

A.K. SIKRI, J.

1. These cases have a chequered history. It is round two of the litigation between the parties. Proceedings in round one were commenced at the instance of respondent no.3 herein. It felt aggrieved by wrong allotment of CGHS Units/Dispensaries pursuant to tenders floated by respondent no.2 herein. While that battle was being fought, in deference to the *prima facie* view expressed by the court, an administrative decision was taken by the respondents 1 and 2 to allot respondent no.3 CGHS Units/Dispensaries at Yamuna Vihar and Dilshad Garden which were earlier allotted to two petitioners herein. Thus while giving allotment to respondent no.3, petitioners were deprived of the aforesaid allotment. As a consequence, present writ petitions are filed by them challenging the action of the respondents. To appreciate the controversy in these petitions, we may take note of the facts sequentially and in some detail.

2. Respondent no.2 floated tender inviting bids of allotment of CGHS Units/Dispensaries for supply of medicines and drugs across Delhi-for 32 groups in all. In fact Delhi Region of CGHS is divided in 32 groups. In each group there are few dispensaries/units. In this writ petition, we are concerned for group XVIII under which there are 4 dispensaries which

are situated at Vivek Vihar, Shahadara, Yamuna Vihar and Dilshad Garden. Three bidders finally emerged for consideration of their bids, namely, (a) M/s.Kailash Chemist (petitioner in WP(C)No.5582/07), (b) M/s.Jain Medicos (petitioner in WP(C)No.5583/07) and (c) M/s.N.G.Medical Agencies (respondent no.3 herein). The official respondents rejected the bid of respondent no.3. With this rejection the two petitioners were left in the fray. Both were declared as L-1 (Lowest) bidders and were allotted two dispensaries each in Group XVIII. The petitioner Kailash Chemist was allotted Vivek Vihar dispensary on permanent/regular basis and Dilshad Garden dispensary on temporary basis. Likewise, M/s.Jain Medicos was given the allotment of Shahadara dispensary on regular basis and Yamuna Vihar dispensary on temporary basis.

3. Respondent no.3 did not accept the decision of the official respondents in rejecting its bid. It thus filed WP(C)No.14659-60/2006 in this Court challenging the said rejection. This writ petition was dismissed by Single Judge of this Court vide judgment dated 20.9.2006. Not satisfied, respondent no.3 took the matter in appeal before Division Bench in the form of LPA No.1984/2006. Respondent no.3 also filed another WP(C)

No.16244/2006 in which he arrayed both these petitioners as respondents though in the first petition they were not made parties. The LPA and WP were ultimately taken up together. Matter was heard on 17.7.2007 and following order was passed by the Division Bench:

> "We have heard the matter in part. We have also looked into the records of the appellant. We are prima facie of the opinion that rejection of the tender of the appellant on the alleged ground is perverse. However, in terms of the request made, we grant two days time to the respondent to obtain instructions and to look into the record. We would also like to look into other records of the respondent which led to the allotment of the contract in question in respect of group 18 in favour of the allottees and that also ignoring the case of the appellant.
>
> Renotify on 19th July,2007.
>
> A copy of this order be given dasti to counsel appearing for the respondent, under signature of the Court Master."

4. On 19.7.2007 which was the next date, counsel for respondents 1 and 2 asked for some more time to obtain instructions. It was granted as last opportunity with clear indication that otherwise the matter would proceed on merits on the next date which was fixed as 23.7.2007.

5. Thereupon, the official respondents issued two Office Memoranda both dated 19.7.2007 whereby the allotments of Yamuna Vihar and Dilshad Garden dispensaries in favour of two petitioners were cancelled and allotted to respondent no.3. On 23.7.2007 when the matter came up before the Division Bench, counsel for respondents 1 and 2 produced the aforesaid two Office Memoranda and in view of the allotments of these two dispensaries in favour of respondent no.3 the Court permitted respondent no.3 to withdraw the LPA as well as Writ Petition. While giving such direction, the following order was passed:

> "The respondents have now issued an order dated 19th July,2007 offering allotment of two dispensaries for supply of medicine/drugs with immediate effect on the same terms and conditions at a discount of 5.4% or printed price for the remaining period 2005-2007.
>
> In view of the aforesaid position and allotment of the dispensaries to the appellant, learned counsel for the appellant states that he may be permitted to withdraw this appeal.
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> Mr.Rajesh Gupta, learned counsel for the respondent Nos.10 and 11 in W.P.(C) No.16244-45/2006 states before us that after issuance of the aforesaid order, the said respondents are not permitted to supply medicine/drugs to the aforesaid dispensaries. Learned counsel appearing for the CGHS Medical Store Depot states that they would continue to supply medicine/drugs to other dispensaries. Order dated 19th

> July,2007 is not subject matter of this appeal and under challenge in this Court. We, therefore, give permission to withdraw the appeal.
>
> The appeal stands dismissed as withdrawn."

6. Before we proceed further, it would be necessary to keep in mind the nature of challenge posed by respondent no.3 in the LPA and Writ Petition filed by it. The challenge of respondent no.3 in the LPA and Writ Petition was predicated on Clause-6 of the tender conditions as per which the bids offering highest discount were accepted. Submission of respondent no.3 was that it had offered the highest discount of 5.4% whereas the two petitioners herein had offered a discount of 3.1% only. Respondent no.3 had also alleged that a group of shopkeepers have a pool and influence on the allotment team and they do not allow any new shopkeeper to enter in the supply chain. The reason given by respondent no.2 in rejecting its bid was termed by the respondent no.3 as illegal and arbitrary. As per respondent no.2, the envelop containing bid price was not as per the format in terms of bid clause-3. It was further alleged that audited documents submitted by the petitioner were also not signed on each page of the documents submitted by him and, therefore, the bid was

not in accordance with Clause 24(v). Respondent no.3 had submitted that there was no major lapse on its part. He also submitted that it was for this reason that the Joint Secretary had advised that all cases having no major lapse be reconsidered as it would affect the Government revenue.

7. While dismissing the writ petition, the learned Single Judge had observed that though such advice was given by the Joint Secretary on 10.3.2006, subsequently it was decided on 10.5.2006 that this suggestion is not to be acceded to and was shelved and subsequently bid of the respondent no.3 remained ineligible. When the matter came up in LPA before the Division Bench, as pointed out above, after hearing these matters on 17.7.2007 the Division Bench expressed that "we are prima facie of the opinion that rejection of the tender of the appellant on the alleged ground is perverse". This order further discloses that at that stage counsel for respondents 1 and 2 had taken two days time to seek instructions and ultimately two Office Memoranda each dated 19.7.2007 were issued taking away one dispensary each from these two petitioners and allotting the same to respondent no.3.

8. The position which emerges from the aforesaid discussion could be summarized as under:

9. The discount offered by respondent no.3 in its bid was the maximum i.e.5.4%. The two petitioners had initially offered a discount of 2.5% which was increased to 3.1% subsequently. Therefore, the discount offered by respondent no.3 was much more than that of the two petitioners and if the bid submitted by respondent no.3 was otherwise proper and he was not to be rendered ineligible as per the tender terms, respondent no.3 was entitled to allotment of all the four dispensaries in Group XVIII. The alleged lapse in not submitting the bid in the proper format was treated as minor. One of the Joint Secretaries, on this basis had even suggested that such bids be reconsidered as otherwise revenue loss to the Government would be substantial. The Division Bench on 17.7.2007 expressed prima facie opinion describing the decision of rejection of the bid of respondent no.3 as `perverse' and gave an opportunity to respondents 1 and 2 to take remedial steps themselves. Such an opportunity was afforded to respondents 1 and 2 on the request of their counsel as respondents 1 and 2 did not want any adverse comments. Respondents 1 and 2, in these circumstances, took a decision to take away the two dispensaries allotted to these two petitioners on temporary basis so that these two are allotted to respondent no.3 (who

would have, in normal course, succeeded in getting allotment to all the four dispensaries). One dispensary each to the two petitioners which were allotted on regular basis were not touched by the respondents 1 and 2. This according to us is an equitable solution found by the respondents 1 and 2 in the given circumstances. The petitioners are continuing with one dispensary each though they could have lost allotment to all the dispensaries. Respondent no.3 also accepted and was satisfied with the allotment of two dispensaries.

10. Faced with this situation, learned counsel for the petitioners submitted that though the allotment of dispensaries at Dilshad Garden and Yamuna Vihar was initially made on temporary basis, this was in fact regularized on 6.7.2006. He buttressed this submission by referring to orders dated 20.9.2006 passed in WP(C)No.14659-60/2006 wherein counsel for respondents 1 and 2 had made a statement that the allotment of two dispensaries was regularized. The order passed on that date was to the following effect:

> "Mr. Dalal has also pointed out that all the bids which were found to be eligible in the first instance to whom the temporary acceptance letters were issued have been regularized on 06.07.2006 before the filing of the present writ petition. According to him in absence of

> M/s. Kailash Chemists and M/s. Jain Chemists whose bids were regularized for group XVIII no such writ order or directions can now be passed as has been sought by the petitioner."
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> The said order was challenged in LPA.No.1984/2006.

11. No doubt such a statement was made by counsel for respondents 1 and 2. However, veracity was questioned by learned counsel for respondent no.3. In order to know the exact position, we summoned the records. We also confronted Mr.Keshav Dayal, learned senior counsel who appeared for respondents 1 and 2. Mr.Keshav Dayal was candid in his reply that there were no such regularization and he submitted that it appears that statement by the counsel was made in some mistaken belief. Even the records show that there was no such regularization of these two dispensaries allotted on temporary basis. In fact the record revealed that many other dispensaries in various groups were allotted on temporary basis, not only the two dispensaries in question which were allotted to the two petitioners on temporary basis. Since allotment in favour of the petitioners insofar as these two dispensaries are concerned was temporary, the petitioners cannot even claim their right to continue with this allotment. It is only for those dispensaries which were allotted on

31.3.2006 on regular basis that the duration of allotment is two years. As far as these two dispensaries are concerned, no right has accrued in favour of the petitioners.

12. As stated above, in the given scenario, cancelling their allotments in favour of the petitioners to accommodate respondent no.3, who could have been entitled to allotment of all the four dispensaries in Group XVIII, cannot be treated as arbitrary or irrational but is most equitable. Therefore, we are of the opinion that it is not a case which calls for interference in exercise of our powers of judicial review under Article 226 of the Constitution of India. We, therefore, dismiss these writ petitions as devoid of any merit but leave the parties to bear their own costs.

(A.K. SIKRI)
JUDGE

September 07 , 2007.
skk

(VIPIN SANGHI)
JUDGE

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) No.5583 of 2007

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4. Whether Reporters of Local papers may be allowed to see the Judgment?
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For orders see, file of W.P.(C) No.5582 of 2007